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THE [redacted] TRANSPORT [redacted], Appellant,

vs.

THE [redacted] RAILWAY COMPANY, Appellee.

[redacted]

[redacted]
Counsel for Appellant.

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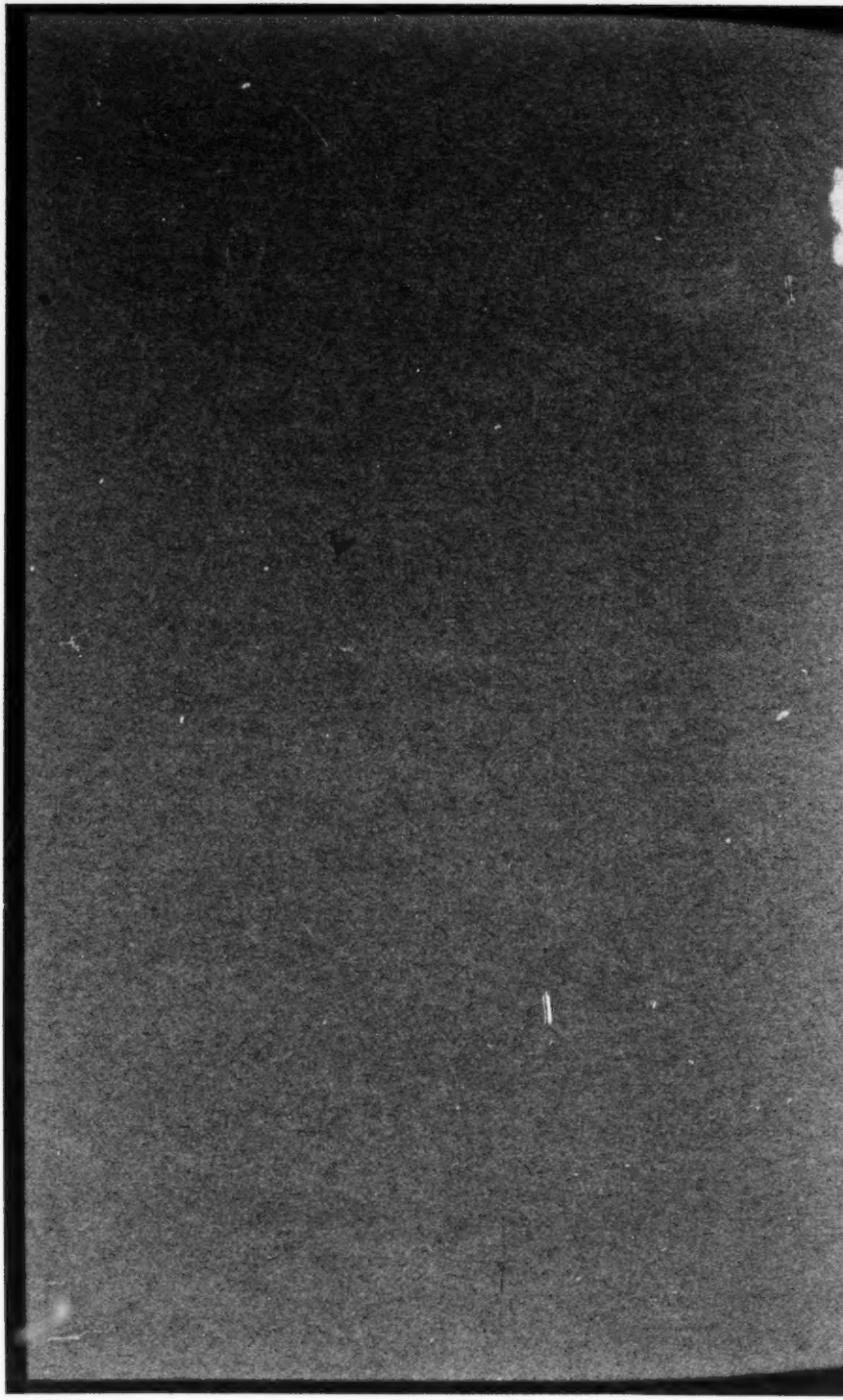

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 362.

THE MADISONVILLE TRACTION COMPANY, . . . *Appellant*,

vs.

THE SAINT BERNARD MINING COMPANY, . . . *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT.

The appellant, the Madisonville Traction Company, hereinafter called the Traction Company, is a Kentucky corporation, having corporate power to build and operate an electric railroad.

The appellee, the Saint Bernard Mining Company, hereinafter called the Mining Company, is a Delaware corporation, owning a large tract of land in Hopkins County, Kentucky, and carrying on the business of mining coal therefrom.

The projected line of railroad which the Traction Company proposes to build runs through the lands of the Mining Company, and the former company being unable to agree with the latter for the needful right of way through these lands, began condemnation proceedings in the Hopkins County Court. These proceedings were instituted in accordance with the statute laws of Ken-

tucky providing for the condemnation of private property for railroad uses, and sought to condemn a defined portion of the lands of the Mining Company as a right of way for the railroad.

The statutes of Kentucky providing for the condemnation of private property for railroad uses are in full as follows:

"SECTION 835. When any company authorized to construct a railroad shall be unable to contract with the owner of any land or material necessary for its use for the purpose thereof, it shall file, in the office of the clerk of the County Court, a particular description of the land and material sought to be condemned, and may apply to the County Court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county who are owners of land, and who shall be sworn to faithfully and impartially discharge their duties under this law.

"SEC. 836. It shall be the duty of said commissioners to view the land and material, and to award to the owner or owners the value of the land or material taken, which shall be stated separately; and they shall also award the damages, if any, resulting to the adjacent lands of the owner, considering the purposes for which it is taken, but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. They shall return a report, in writing, to the office of the clerk of said court, stating their award, and shall describe in their report the land and material condemned, give the names of the owners, and whether nonresidents of the State, infants, of unsound mind, or married women.

"SEC. 837. Upon the application of said company, and upon filing such affidavits, as may be necessary, the clerk of said court shall issue process against the owners to show cause

why the said report should not be confirmed, and shall make such orders as to non-residents and persons under disability as are required by the Civil Code of Practice in actions against them in the Circuit Court.

"SEC. 838. At the first regular term of the County Court, after the owners shall have been summoned the length of time prescribed by the Civil Code of Practice before an answer is required, it shall be the duty of the court to examine said report, and if it shall appear to be in conformity to this law, and to the extent that no exceptions have been filed thereto by either party, it shall confirm said report as against the owners not excepting.

"SEC. 839. When exceptions shall be filed by either party, the court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions, and each juror shall be allowed one dollar per day for his services, to be taxed as cost. In assessing the damages the jury shall be governed by the rule prescribed in Section Eight Hundred and Thirty-six of this law, and, upon the request of either party, may be sent by the court, in charge of the sheriff, to view the land or material. If sufficient cause be not shown for setting aside the verdict, the court shall render judgment in conformity thereto, and shall make such orders as may be proper for the conveyance of the title upon the payment of the damages assessed. Either party may appeal to the Circuit Court, by executing bond as required in other cases, within thirty days, and the appeal shall be tried *de novo*, upon the conformation of the report of the commissioners by the County Court, or the assessment of damages by said court, as herein provided, and the payment to the owners of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the County Court when the damages are assessed by said court, and all cost adjudged to the owner, the railroad company shall be entitled to take possession of said land and material, and to use and control the same for the

purpose for which it was condemned as fully as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the County Court by the company, it shall not be entitled to take possession of the land or material condemned until it shall have paid into court the damages assessed and all costs. All money paid into court under the provisions of this law shall be received by the clerk of the court and held subject to the order of the court, for which he and his sureties on his official bond shall be responsible to the persons entitled thereto.

"SEC. 840. The appeal from the County Court shall be taken by filing with the clerk of the court to which the appeal lies, a statement of the parties to the appeal, and a transcript of the orders of the County Court, and thereupon the said clerk shall certify to the clerk of the County Court that said appeal has been filed, and the clerk of the County Court shall immediately transfer the original papers to the clerk of the court to which the appeal is pending; and if the owner on his appeal shall fail in the Circuit Court to increase the amount of damages awarded in the County Court, he shall pay all the costs of the appeal; if the damages are increased in the Circuit Court, the other party shall pay all the costs of the appeal. The same rule as to payment of costs shall apply when the appeal is prosecuted by the party seeking to condemn land." (Ky. Statutes, Secs. 835 to 840, inclusive).

Following the provisions of this statute, Commissioners were appointed by the Hopkins County Court, who duly returned their report and appraisement of damages in writing. Process was issued and served on the Mining Company to show cause why the report of the Commissioners should not be confirmed. Thereupon the Mining Company filed a petition in the County Court for the removal of the proceedings into the Circuit Court of the United States for the Western District of Kentucky on the ground of diverse citizenship. The County Court denied the petition on the ground that the proceedings are not removable. The

Mining Company thereafter duly filed in the United States Circuit Court for the Western District of Kentucky a complete transcript of the proceedings in the Hopkins County Court. Fearing that the Traction Company would prosecute the proceedings in the Hopkins County Court, notwithstanding the petition for removal had been filed therein, and notwithstanding the transcript of the proceedings had been filed in the United States Circuit Court, the Mining Company, on the 2nd day of January, 1904, filed a bill in equity in the Circuit Court of the United States for the Western District of Kentucky against the Traction Company, praying an injunction against the latter company to restrain it from further prosecuting the proceedings in the Hopkins County Court.

The bill set out the proceedings in the County Court, including the orders of the court on the petition of the Mining Company for removal, and alleged that the Mining Company had duly filed a complete transcript of the proceedings in the United States Circuit Court, and alleged further that, notwithstanding these facts, the Traction Company intends to, and will, unless enjoined therefrom, prosecute the proceedings in the County Court. (Bill, R. pp. 1, 2, 3, 4, 5.)

Upon this bill a preliminary order of injunction was granted on the 6th day of January, 1904. (R., p. 18.)

The Traction Company filed a demurrer to the bill, on the ground that the United States Circuit Court has no jurisdiction or power to grant the injunction prayed for in the bill, or to grant any other or like relief. (R., pp. 19, 20.)

The case came on for hearing on the demurrer to the bill, and the demurrer was overruled. There was heard and decided at the same time a motion made by the Traction Company to remand the condemnation proceedings to the County Court, which motion was also, at the same time, overruled. (R.. pp. 20, 21.)

The court delivered a written opinion overruling the demurrer, and made a part of it, by reference, the opinion delivered overruling the motion to remand the condemnation proceedings to the County Court. (R., pp. 21 to 27 inclusive.)

The Traction Company, standing by its demurrer, and failing to answer, a final decree was entered on the 26th of July, 1904, granting a perpetual injunction against the Traction Company as prayed for in the bill. (Decree, R., pp. 27, 28.)

The Judge of the Circuit Court certified the question of jurisdiction to this court for decision.

From that decree this appeal is prosecuted.

Specification of Errors.

1. The condemnation proceedings were not transferable from the Hopkins County Court to the United States Circuit Court, and, therefore, the latter court never had any jurisdiction thereof, and the proceedings, should have been remanded to the Hopkins County Court.

2. The jurisdiction of the United States Circuit Court to grant any relief in this suit is bottomed on its jurisdiction of the condemnation proceedings, and being without any jurisdiction of the condemnation proceedings it had no jurisdiction whatever of this suit.

3. In any event the United States Circuit Court had no jurisdiction to enjoin proceedings in the Hopkins County Court, because the Act of Congress (U. S. Revised Statutes, Sec. 720) prohibits Courts of the United States from granting any writ of injunction to stay proceedings in any State Court, except in cases where such injunction may be authorized in proceedings in bankruptcy.

ARGUMENT.

I

Condemnation proceedings, prior to the Act of 1887, were sometimes transferable from the State Court in which they were pending into the Circuit Court of the United States. When

the proceedings in the State Court reached the point where nothing remained to be done but to inquire into and adjudge *the amount of damages*, then they became, *at that time*, a transferable controversy, and not before. Such seems to be the rule deducible from the decisions of this court. The rule rests upon the proposition, that the right of *eminent domain* is a sovereign prerogative inherent in the State government, and in the exercise of that sovereign prerogative, whether the proceeding is directly in the name of the State or in the name of a grantee of the State; no other sovereignty, by any of its departments, has the power to interfere. This rule is necessary to the preservation of the constitutional sovereignty of the State as a separate governmental entity.

The question first arose in this court in the case of *Boom Company vs Patterson*, *98 U. S.*, *403*. There the court said, Mr. Justice Field delivering the opinion:

> "The position of the Company on this head of jurisdiction is this: that the proceedings to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public use, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by

them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between parties—the owners of the land on the one side, and the company seeking the appropriation on the other—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words the value of the property taken. No other question was open to contestation in the District Court. Turner vs. Halloran, 11 Minn., 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and a citizen of another State, can not be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

In Searl vs. School District No. 2, 124 U. S., 197, this court held that condemnation proceedings commenced in a County

Court of Colorado by a School District to condemn lands for public school purposes were transferable to the Circuit Court of the United States. This was held under the peculiar statutes of Colorado. The court, however, approved the doctrine of Boom Company vs. Patterson.

The two cases above referred to are the only cases, so far as we have been able to discover, involving directly the question whether condemnation proceedings are transferable from a State to a Federal Court.

A cognate question arising out of the assessment of property for taxation was decided by this court in Upshur County vs. Rich, 135 U. S., 467. There Mr. Justice Bradley, who delivered the opinion of the court, after reviewing all of the authorities, including Boom Company vs. Patterson, said:

> "The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and can not, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit, but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.
>
> "Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that, although the appeal from the assessment was made to the 'County Court' *eo nomine*, yet that this is not a judicial body, invested with judicial functions, except in matters of probate, but is the executive or administrative board of the county, charged with the management of its financial and

executive affairs. According to the principles laid down by the State Court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct."

Under the Constitution and laws of Kentucky, condemnation proceedings in the County Court are the initial administrative proceedings wherein the determination whether the property shall or or shall not be appropriated—whether the sovereign prerogative of the State shall be exercised with respect of the particular appropriation proposed by the proceedings—and, as a necessary incident, an assessment of damages is made, preliminarily, to determine the amount which shall be paid to the owner of the property before the actual taking.

Section 242 of the Constitution of Kentucky is as follows:

"Municipal and other coporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual, made by commissioners or otherwise; and upon appeal from such preliminary assessment the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

This provision of the Constitution contemplates a determination of the question whether the appropriation shall be made involved in which is a preliminary assessment of damages, the

amount of which assessment shall be paid before the property is taken; and this section of the Constitution further provides that appeals shall be allowed from such preliminary assessment of damages, and that upon such appeals the amount of damages shall "be determined by a jury according to the course of the common law."

The condemnation statutes of Kentucky were passed in accordance with this constitutional provision. These statutes have been quoted in full in this brief, and their provisions may be thus summarized:

1. That any company authorized to construct a railroad which shall be unable to contract with the owner of land necessary for the uses of the railroad company, shall file in the office of the Clerk of the County Court a particular description of the land sought to be condemned, and ask the County Court to appoint three commissioners to view the land and report, in writing, the damages which will result to the owner of the land from the proposed appropriation.

2. That these commissioners shall, after being sworn, view the land and report their award in writing to the County Court, stating therein the names of the owners of the land.

3. That the railroad company, upon the filing of the commissioners' report, may cause process to be issued against the landowners requiring them to show cause why the report of the commissioners should not be confirmed.

4. If the owners of the land shall file exceptions to the report of the commissioners, the County Court shall forthwith cause a jury to be empaneled to try the issues of fact made by the exceptions.

5. At the end of the proceedings in the County Court, whether the end comes from a confirmation of the report of the commissioners, or whether it comes after a jury has returned a verdict upon the questions of fact raised by the exceptions, the railroad company is empowered to take possession of the land and proceed with its work, upon paying to the landowner the damages ascer-

tained by the proceedings and all costs adjudged to the owner, and this right exists notwithstanding the landowner shall take and prosecute an appeal.

6. That either party may appeal to the Circuit Court of the County, where a trial shall be had *de novo*, and if the landowner appeals, and upon a trial in the Circuit Court the amount of damages there awarded are not greater than the amount awarded in the County Court, he shall pay all the costs of the appeal.

The general jurisdiction of County Courts in Kentucky is almost purely administrative. That jurisdiction relates to the probate of wills, the granting of letters of administration, the appointment of guardians, trustees, committees, curators and other fiduciaries, the granting of tavern, drug and liquor licenses, etc. The general jurisdiction of County Courts is defined by Section 1057 of the Kentucky Statutes, which is as follows:

> "The County Court shall have jurisdiction to probate wills, appoint and remove personal representatives, guardians, trustees, committees, curators and other fiduciaries, to grant tavern, drug and liquor licenses, and such other jurisdiction as may be conferred upon it by law."

It is provided by the condemnation statutes that this administrative court shall determine whether appropriations of private property to railroad uses shall be made, and preliminarily determine the damages to which the owner of the property shall be entitled. It is of no importance that the statute authorizes the empaneling of a jury in that court, for the jury is merely adjunctive.

The right to take the property is determined in the County Court, and all costs in that court, both of the landowner and of the railroad company, are to be paid by the railroad company. On the appeal to the Circuit Court, however, it is provided as in ordinary litigation between parties, that the unsuccessful party shall pay all costs.

Wherefore, it is certain that under the Constitution and laws of Kentucky the proceedings in the County Court to condemn

land for railroad uses are the steps whereby the State exercises its sovereign power of *eminent domain*. No other government or sovereignty has the power to interfere with the exercise by the State of that governmental power, by preventing the grantee of the State from taking these preliminary steps in the County Court. When the State accomplishes its purpose, and, through the machinery created by its Constitution and laws, shall have determined whether the appropriation of the private property to the public use shall or shall not be made, then a controversy may arise which is susceptible of transfer to a Federal Court. Such a controversy can not arise until an appeal shall have been taken to the Circuit Court of the County, after the machinery which the State has provided for carrying out its sovereign right of *eminent domain* shall have performed its functions.

This appeal is from the preliminary assessment of damages, and in the language of the Constitution, upon the appeal "the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

This common law controversy in the Circuit Court of the County is a controversy which, under the judiciary act of 1875, was transferable to the United States Circuit Court. If the railroad company appealed to the Circuit Court of the County, the landowner might in that court file a petition for removal, or on the other hand, the landowner might appeal to the Circuit Court of the County, and there file his petition for removal. It is true that the statute provides that the trial in the Circuit Court shall be *de novo*, but it is obvious that the statute did not intend to give to the Circuit Court any other jurisdiction than to determine *de novo* the question of damages, for, the statute provides, that the railroad company shall have the right at the conclusion of the proceedings in the County Court and upon the payment to the landowner of the damages assessed and the costs of the proceedings, to enter upon the land and proceed with its work; and further, the County Court is empowered to make appropriate orders for the conveyance of the land to the railroad company, and all this notwithstanding the appeal to the Circuit Court. The

award of damages made by the County Court, and the payment thereof to the landowner, satisfies the provision of the Constitution that just compensation shall be paid to the property owner before his property shall be taken for public uses. If the landowner, upon the appeal, should be awarded a greater amount in damages than the amount awarded in the County Court, such excess, no doubt, would be a lien on the land taken by the railroad company.

The Court of Appeals of Kentucky has not, so far as we have been able to discover, construed this statute with respect of the extent of the jurisdiction of the Circuit Court of the County on appeals in condemnation proceedings.

That court considered two cases arising before the adoption of the present Constitution, and before the passage of the present condemnation statutes, which seem to involve the question whether the Circuit Court, under the then existing laws, had the jurisdiction to determine the *right* to condemn.

The first case is that of *Tracy, &c., vs. Elizabethtown, Lexington & Big Sandy Railroad Company, 80 Ky. 259.* In that case the right of condemnation and the method of proceeding were provided in the charter of the railroad company, which was granted by special Act of the legislature. By this special Act of the legislature, as appears from the opinion, the proceedings were to be begun by the issuance of a warrant by a Justice of the Peace, on the application of the railroad company, directed to the sheriff of the County, authorizing and directing the sheriff to summon a jury and hold an inquest as to the damages, and the verdict was to be returned to the Circuit Court, and in that court be subject to exceptions and judgment.

The second case is *Portland & Greenwood Turnpike Company vs. Bobb, 88 Ky., 226.* The proceedings there were had under a general condemnation statute, the provisions of which are substantially the same as those of the present condemnation statutes. (General Statutes, Chap. 18—the present compilation of statutes, passed since the adoption of the present Constitution and which superseded the General Statutes, is called Kentucky Statutes.)

It is difficult to determine from the opinion in that case precisely what questions were involved, or how they arose. It seems, however, that the only matter decided was, that in the statement to be filed in the County Court by the party asking the condemnation, it is necessary to aver an effort and failure to agree with the owner of the property, and that the property sought to be condemned is necessary to the uses for which the condemnation is sought. That these are jurisdictional facts and unless averred in the statement the County Court is wholly without jurisdiction. It is further decided in the opinion that the statement can not be amended in the Circuit Court, although the proceedings are there to be tried *de novo*.

But whether the Circuit Court on the appeal from the County Court has jurisdiction to determine the *right* to condemn, as well as the amount of damages, seems to us not decisive of the question at bar. Whatever may be the jurisdiction of the Circuit Court on an appeal, is is certain that the proceedings in the County Court determine originally and preliminarily the right to appropriate the property, and this preliminary determination is not stayed by the appeal to the Circuit Court, but notwithstanding the appeal the party seeking the condemnation may enter upon the property and proceed with the construction of the public work. The governmental function of the State is ended in that proceeding, and the appeal in the Circuit Court proceeds *inter partes*.

We submit that under the Constitution and laws of Kentucky, condemnation proceedings instituted by a railroad company in the County Court could not be transferred from that court into the Circuit Court of the United States even under the judiciary Act of 1875.

II.

The cases of Boom Company vs. Patterson, 98 U. S., 404, and Searl vs. School District No. 2, 124 U. S., 197, were decided under the Act of Congress of 1875. Since the decision of those cases, the Congress has passed the Act of 1887, amended by the

Act of 1888. There is a marked difference between the provisions of the Act of 1875, and the Acts of 1887 and 1888 with respect of the removal of suits from State Courts into the Circuit Court of the United States.

The Act of 1875 defines the original jurisdiction of Circuit Courts of the United States.

After thus defining the original jurisdiction of the Circuit Courts, the Act defines what suits commenced in a State Court may, on the petition of the defendant, be removed from a State Court into a Circuit Court of the United States. Suits that may be thus removed are independently defined, without any reference to that part of the Act creating the *original* jurisdiction of the Circuit Courts wherefore it came about that certain suits of which the Circuit Courts of the United States did not have original jurisdiction, that is to say which the plaintiff could not have brought originally in the Circuit Court of the United States, might, nevertheless, when brought in a State Court be removed into the Circuit Court of the United States on the petition of the defendant. The jurisdiction of the Circuit Courts on removal was not limited to their original jurisdiction. Thus, the Circuit Courts, by an express provision of the Act, did not have jurisdiction of a suit by an assignee to recover the contents of a promissory note or other chose in action unless the suit might have been prosecuted in the Circuit Court if no assignment had been made; yet, where the assignee brought such a suit in a State Court, the defendant might remove the case from the State Court to the Circuit Court of the United States, notwithstanding the fact that the latter court had no original jurisdiction of the suit. *Claflin vs. Commonwealth Insurance Company, 110 U. S., 81; Delaware County vs Diebold Safe Company, 133 U. S., 473.*

But the Act of March 3, 1887, as amended by the Act of August 13, 1888, expressly confines the right to remove a suit from a State Court into a Circuit Court of the United States to suits of which the latter court has *original* jurisdiction. The Acts of 1887-1888 define the jurisdiction of the Circuit Courts. After

doing this they do not, as did the Act of 1875, define independently what suits may be removed from State Courts to the Circuit Courts of the United States, but expressly confine the right of removal to suits of which, under the Act, the Circuit Courts have original jurisdiction. Following is the provision :

> "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.
>
> "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State."

The difference in this respect between the Act of 1875 and the Acts of 1887-1888 has been considered by this court in at least two cases:

In Tennessee vs Union & Planters Bank, 152 U. S., 454, Mr. Justice Gray, delivering the opinion of the court after stating that, even under the act of 1875 where the original jurisdiction of a Circuit Court of the United States is invoked on the sole ground that the determination of the suit depends on a Federal question, the declaration or bill must disclose that fact, said:

> "The same rule applies, more comprehensively, to the Acts of 1887 and 1888. In Section 1, as thereby amended, the

words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the Act of 1875 (except that the jurisdictional amount is fixed at $2,000) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in Section 2 allows removals from a State Court to be made only by defendants, and of suits 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section,' thus limiting the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section, 24 Stat., 553; 25 Stat., 434. The change is in accordance with the general policy of these Acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the Circuit Courts of the United States. Smith vs. Lyon, 133 U. S., 315, 320; *In re* Pennsylvania Company, 137 U. S., 451, 454; Fisk vs. Henarie, 142 U. S., 459, 467; Shaw vs. Quincy Mining Company, 145 U. S., 444, 449; Martin vs. Baltimore & Ohio Railroad, 151 U. S., 673,687."

In Mexican National Railroad Company vs. Davidson, 157 U. S., 201, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"By the second section of the Act of March 3, 1875, C. 137, 18 [Stat. 470, the exception out of the original jurisdiction as to assignees of choses in action occupied the same relative position as in the Act of 1789, and the same conclusion was reached in regard to it, namely, that the restriction upon the commencement of suits contained in Section 1 did not apply to the removal of suits under Section 2. Claflin vs. Commonwealth Insurance Co., 110 U. S., 81; Delaware County vs. Diebold Safe Co., 133 U. S., 473. And see Goldey vs. Morning News, 156 U. S., 518.

"But the second section of the Act of 1887 (as corrected in 1888) contained a radical difference from Section 12 of the Act of 1789 and Section 2 of the Act of 1875 in confining the suits which might be removed to those 'of which the Circuit Courts of the United States are given original jurisdiction by the preceding section.' As already stated, the last part of the preceding section provides that no Circuit or District Court shall have cognizance to recover the contents of a chose in action in favor of an assignee, unless such suit might have been prosecuted therein to recover such contents if no assignment had been made, while the second section provides for the removal of suits now pending, or which may be hereafter brought in any State Court, of which the Circuit Courts of the United States were given jurisdiction by the first section. This change was made in accordance with that intention to restrict the jurisdiction of the Circuit Courts, which has been so often recognized by this court. Smith vs. Lyon, 133 U. S., 315, 319; *In re* Pennsylvania Company, 137 U. S., 451, 454; Fisk vs. Henarie, 142 U. S., 459, 467; Shaw vs. Quincy Mining Company, 145 U. S., 444; Hanrick vs. Hanrick, 153 U. S., 192.

"We must hold, therefore, as has indeed already been ruled, Tennessee vs. Union & Planters' Bank, 152 U. S., 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and can not be waived. Capron vs. Van Noorden, 2 Cranch, 126; Mansfield Railway Company vs. Swan, 111 U. S., 379; Metcalf vs. Watertown, 128 U. S., 586. It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought 'only in the district of the residence of the plaintiff or the defendant,' and this restriction is a personal privilege of the defendant, and may be waived by him. St. Louis & San Francisco Railway vs.

McBride, 141 U. S., 127. Section 2, however, refers to the first part of Section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. McCormick Machine Co. vs. Walthers, 134 U. S., 41."

This court has, therefore, held that the jurisdiction of the United States Circuit Courts on removal is limited to suits of which they have *original* jurisdiction.

Have the Circuit Courts of the United States original jurisdiction of condemnation proceedings under State statutes in cases where the party seeking to condemn and the owner of the property sought to be condemned are citizens of different States? This question, we respectfully submit, must be answered in the negative.

The right of *eminent domain* is distinctly and exclusively an attribute of government—of sovereignty. This court said in *Kohl, et al., vs. United States, 91 U. S. 371:*

> "No one doubts the existence in State governments of the right of eminent domain—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk, lib. 2, c. 15; Kent's Com. 338, 340; Cooley on Const. Lim., 584, *et seq.*"

Such being the undisputed nature of the right of *eminent domain*, an essential attribute of the right must be the subsidiary right in the State government itself to exercise the original gov-

ernmental right in its own way subject only to such limitations as may be imposed by its fundamental law. Otherwise the right itself might be subverted or destroyed. The State government, by its legislative department, has provided how, and in what cases, the right shall be exercised for the benefit of various public services supplied by private corporations. The right is exercised exclusively under a grant from the government, and the very terms and conditions of the grant are that it shall be exercised in a particular way. Without the grant from government, no person or corporation, although engaged in furnishing a public service, could employ the right of eminent domain, however necessary to the public use the private property of the citizen might be. A condition of the grant is that the right shall be exercised in a certain way. A particular functionary—in this case a County Court—is given initial jurisdiction. Under the conditions of the grant no other functionary or court can exercise the jurisdiction.

This particular question was decided by the Circuit Court of the United States for the District of Connecticut in *Hartford, &c., W. R. Co. vs. Montague, 94 Fed. Rep., 227.* There it was decided that condemnation proceedings under the laws of Connecticut can not be brought originally in the Circuit Court of the United States, and that, therefore, such proceedings are not removable into the Circuit Court of the United States.

To hold that the initial steps in condemnation proceedings are transferable to the Federal Courts, or that the Federal Courts have jurisdiction of such initial steps would impair the right of condemnation to such an extent as to render it practically worthless. The sessions of the Circuit Courts of the United States are infrequent, the Circuit Court of the United States for the Western District of Kentucky having two sessions a year at Owensboro. The Kentucky condemnation statute provides that the railroad company may file a statement in the County Clerk's office, and at once apply to the County Court to appoint commissioners. The commissioners are at once empowered to enter upon their

duties. When their report is returned a process to show cause issues against the landowner returnable to the next regular term of the County Court. That court holds a regular term once in each month. If exceptions to the report are filed, it is made the duty of the court forthwith to empanel a jury to try the issues of fact made by the exceptions. The necessities of the case require this expedition. Great and costly public works may await the final result of the proceedings in the County Court. No appeal to any court is allowed to prevent the taking of the property under the proceedings in the County Court.

In the case at bar the whole project has been suspended by the injunction granted by the court below.

We submit that the Circuit Court of the United States did not have original jurisdiction of the condemnation proceedings, and on that ground the proceedings were not removable from the Hopkins County Court.

III.

The injunction granted by the court below in the final decree is as follows:

> "It is therefore accordingly ordered, adjudged and decreed by the court that the defendant Madisonville Traction Company, its officers, agents and employes and each of them, be and they are perpetually enjoined and restrained from further prosecuting or causing to be prosecuted in the Hopkins County Court, the proceeding described in the bill of complaint, and which was instituted by the said defendant against the said complainant in the Hopkins County Court, and from taking any steps therein, in said County Court, or causing any orders to be made by said County Court in said proceeding or taking any proceeding whatever therein in said County Court, and from entering upon the land described in said proceeding or any part thereof, under any order of said County Court in said proceeding." (R., page 27.)

This injunction is in the very teeth of the Act of Congress—U. S. Revised Statutes, Sec. 720—which is as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

No doubt that the United States Circuit Court would have the power, in the protection of its jurisdiction, to declare any judgment rendered by the Hopkins County Court void which might have been rendered after the transfer of the proceedings to the Federal Court, and to enjoin the Traction Company from taking any steps to enforce the judgment, and from entering on the lands under the judgment. This power would be absolutely necessary to the jurisdiction of the Federal Courts. But the injunction in the case at bar restrains the prosecution of the proceedings to judgment, or taking any steps whatever to reach a judgment in the County Court. This, we submit, is prohibited by the Act of Congress. We content ourselves with the mere citation of cases decided by this court which the court below regarded as supportive of the jurisdiction to grant such an injunction. An analysis of these cases will show that the only jurisdiction is to grant an injunction against the enforcement of a judgment rendered in a State Court after the jurisdiction in the same controversy in which the State Court judgment was rendered had in some way attached in the Federal Court. If the suit or proceedings in the State Court is merely a method of enforcing a judgment of the State Court, which judgment is void because rendered after the jurisdiction of the Federal Court attached then the suit or proceedings may be enjoined by the Federal Court, because such an injunction is nothing more than restraining the *enforcement* of the void judgment. But it is altogether a different thing to enjoin, in the first instance, the taking of any steps in the State Court looking to the rendition of a judgment in the original suit. The rule is that a Federal Court has the power by

injunction to prevent the execution of a judgment of a State Court rendered in defiance of the jurisdiction of such Federal Court. Certainly where property is in the actual or constructive possession of a Federal Court, that court may protect its possession by any sort of injunction that may be necessary for that purpose.

The cases heretofore decided by this court, and relied on in the opinion of the court below to support the decree, do not, we submit, have that effect. These cases are French vs. Hay, 22 Wallace, 231; Moran vs. Sturgis, 154 U. S., 269; Dietzsh vs. Huidekoper, 103 U. S., 494; and Kern vs. Huidekoper, 103 U. S. 483.

We respectfully ask that the decree be reversed with directions to dismiss the bill.

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